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In The

Circuit Court of the United States

For the District of Nebraska.

NATIONAL PHONOGRAPH COMPANY,

Complainant,

vs.

THE WITTMANN COMPANY,

Defendant.

In Equity.

The validity of this contract cannot successfully be assailed on the ground that by restricting the persons to whom the goods can be sold, and by restricting the prices at which they may be sold, it tends to create a monopoly and to keep up prices, and so is contrary to public policy and therefore invalid.

The cases are unanimous in holding that a dealer in ordinary articles of commerce may by contract restrict the prices at which they can be sold.

Gloucester Isinglass Co. v. *Russia Cement Co.*, 154 Mass., 192.

"A contract between two corporations manufacturing glue from fish skins under a patent supposed by both to be valid, the object of which was to avoid competition and to regulate prices, is not void as against public policy, the fish glue

not being an article of prime necessity or a commercial commodity ordinarily bought or sold in the market."

Park & Sons v. *National Druggists' Association*, 54 Appel. Div., N. Y., 223.

A contract to restrict the prices at which proprietary medicines may be sold is valid.

The Court quotes the language of Lord Coleridge, *L. C. J.*, in *Steamship Co.* v. *McGregor*, L. R. 21, Q. B. D., 544, as follows: (p. 552.)

"The defendants are traders, with enormous sums of money embarked in their adventure, and naturally and allowably desire to reap a profit from their trade. They have a right to push their lawful trade by all lawful means. They have a right to endeavour, by lawful means, to keep their trade in their own hands, and by the same means to exclude others from its benefits, if they can. Amongst lawful means is certainly included the inducing by profitable offers customers to deal with them rather than with their rivals. It follows that they may, if they see fit, endeavour to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think that it matters that the withdrawal of the advantages is out of all proportion to the injury inflicted on those who withdraw them by the customers, who decline to deal exclusively with them, dealing with other traders."

Attorney General v. *American Tobacco Co.*, 10 Dick., (N. J.) 352, 363. Affirmed, 11 Dick., 847.

A trading or manufacturing corporation, until its charter is annulled by *quo warranto*, has the same authority as an individual trader or manufacturer to sell

or consign its goods, to select its selling agents and to impose conditions as to whom they shall sell and the terms upon which they shall sell.

Walsh v. *Dwight*, 40 N. Y. Appel. Div. 513.

A contract in regard to saleratus and soda, similar to the contract in question in this case, was held to be valid. In this decision a distinction is made between a contract to maintain prices between a manufacturer and a dealer, and an agreement between rival manufacturers.

On page 516 the decision says:

> "It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendant would have the right to establish agencies for the sale of their goods, or to employ others to sell them at such prices as the defendants should designate, would not be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell to others upon conditions that the vendees in selling at retail should charge a specified price for the goods sold, or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturers to charge a particular price for the articles which he sells in his business, such an agreement is not illegal or in restraint of trade, or as tending to create a monopoly."

Commonwealth v. *Grinstead*, 63 S. W. Rep. 23 Ky. L. R., 590.

A manufacturer "regulates and controls the minimum price at which the jobbers may sell the goods, and this is done by requiring the customers to agree not to resell the goods at a price less than that fixed by him."

Held not to be a violation of the Kentucky "Trust Statute."

Garst v *Harris*, 58 N. E. Rep. 174;177, Mass., 72.

> HOLMES, *C. J.* "A contract between the manufacturer of a secret patent medicine and the purchaser that the purchaser would not sell the medicine for less than a certain price, was a proper restriction not void as in restraint of trade. * * * When as here, there is a secret composition which the defendant presumably would have no chance to sell at a profit at all, but for the plaintiff's permission; a limit to the price, in the form of a restriction on the price at which he may sell is proper enough.

The "public policy" here invoked is the right of the public at large to have the various dealers compete with each other. In regard to this it was said in *Meredith* v. *N. J. Zinc Co.*, 55 N. J. Eq. 211; 37 At. Rep. 539,

> "No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact the essential quality of that series of acts or cause of conduct which we call 'competition' is that it shall be the result of the free choice of the individual and not of any legal or moral obligation or duty."

Ferris v. *American Brewing Co.*, 52 L. R. A. 305; 58 N. W. Rep., 101; 155 Ind., 539.

A lessee's agreement to sell no other beer on the premises than that manufactured by a designated company is not invalid as against public policy.

N. Y. Ice Co. v. *Parker*, 21 How. Prac. Rep. (N. Y.) 302.

A dealer in ice imposed restrictions on the right of his customers to sell again for less than a specified price. Held that they were bound by their assent thereto and could not recover damages for refusal to supply after a breach of the rule.

Clark v. *Frank*, 17 Mo. Ap. 602.

A contract whereby a purchaser, in consideration of certain rebates in prices, agrees to maintain a certain price in selling at retail the brand of goods sold, is not a contract in restraint of trade.

As to the common law right of a vendor to sell a restricted interest in personal property owned by him, see also *Crystal Ice Co.* v. *San Antonio*, 27 S. W. Rep. 210.

The contract in this case was sustained on the theory, though not expressly stated, that the restriction put upon the vendee's right to sell ice *related to the ice sold to him by the vendor.* The Court found that the vendee was not engaged in the business of ice manufacturing or selling ice; therefore the contract could relate only to the ice sold by the vendor.

It may be urged that this contract is a violation of the Federal Interstate Commerce Act, and therefore invalid. But the decisions hold that the only contracts which are affected by that act, are those which directly affect interstate commerce, and that contracts indirectly affecting it, such as this, do not come within the prohibition of the act.

Referring to the above act, FULLER, *C. J.*, in delivering the judgment of the Supreme Court of the United States v. Knight, 156 U. S., says:

> "It was in the light of well settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such, or to limit or restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control or disposition of prop-

> erty; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold, or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations."

The contract before the Court was the purchase of sugar refineries in Pennsylvania by the American Sugar Refining Co., to obtain control of the sugar business of the United States. Held not to violate the Interstate Commerce Law.

U. S. v. *Joint Traffic Association*, 171 U.S., 505.

An agreement between competing interstate railroads to maintain certain rates and prevent competition held invalid under act.

> Page 568: "The effect upon interstate commerce must not be indirect or incidental only. An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose thereby to affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce."

Hopkins v. *U. S.*, 171 U. S., 578.

Buying and selling live stock by members of a stock exchange is not interstate commerce, although the stock is from other States. Agreement regulating commissions to be charged is not a restraint of interstate commerce. (Syllabus.)

> "8. A combination of commission merchants at stock yards, by which they refuse to do business with those who are not members of their association, even if it is illegal, is not subject to the act of Congress of July 2, 1890, to protect trade and commerce, since their business is not interstate commerce."

Bement v. *Nat. Harrow Co.*, 186 U. S., 70.

Page 92: "But that statute (Interstate Commerce Act) clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

The right of the owner of a patented article to contract in regard to it is even broader than that of the owner of an ordinary chattel, and a contract of this kind in regard to a patented article is unquestionably valid.

Gamewell v. *Crane*, 35 N. E. Rep., 98; 160 Mass., 50.

An agreement in restraint of trade invalid as to ordinary articles is valid as to patented articles.

Edison v. *Kauffman*, 105 Fed. Rep., 960.

The validity of this contract was specifically decided in this case.

Bonsack Machine Co. v. *Smith*, 70 F. R., 383, 386.

"Patent rights are essentially monopolistic. Not only is the monopoly given to the patentee by the sovereign power, but the courts furnish

every facility for enforcing it. During the enjoyment of this monopoly he is in absolute control of it. A patent right is essentially monopolistic. To contracts granting the exclusive right to use or vend patented articles the general rule (forbidding contracts in restraint of trade) does not apply, however extensive as to territory in their scope and however unlimited as to time. * * * Considerations that might obtain if the agreement were in regard to other articles can be of no weight in the decision of a question arising upon an agreement as to patented articles."

Bement v. *National Harrow Co.*, 186 U. S., 70, p. 91.

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions that are not in their very nature illegal with regard to this kind of property imposed by the patentee and agreed to by the licensee for the right to manufacture, use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

Page 93: "The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value as far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the

assignee shall charge a certain amount for such article."

This contract is one that a Court of Equity will specifically enforce to the extent prayed for in the Complainant's bill.

It may be urged that this contract calls for such personal acts that a Court of Equity will not undertake its enforcement.

Admitting for the purpose of argument the correctness of the contention that the obligation contained in the Jobbers' Agreement is a personal one, specific performance of which the court will not decree, that fact is no answer to the complainant's right to the injunction prayed for. Mr. Pomeroy in his Equity Jurisprudence, Section 1343, after stating that the Court cannot in any direct manner compel an actor to act, a singer to sing or an artist to paint, continues:

"Applying the same course of reasoning, the English Courts formerly held that they could not negatively enforce the specific performance of such contracts by means of an injunction restraining their violation. Those Courts have, however, entirely receded from this latter conclusion. The rule is now firmly established that the violation of such contracts may be restrained by injunction whenever the legal remedy of damages would be inadequate and the contract is of such a nature that its negative specific enforcement is possible. This rule was first applied to stipulations which were in form expressly negative, but was soon extended to affirmative contracts which implied or involved negative stipulations."

And in note 2 to the above Section, he says:

"The most recent English decisions interfere to restrain the violation of such contracts while conceding that their specific performance could not be enforced. This doctrine has been adopted and acted upon to its full extent by a few modern American decisions."

Citing—

Western U. T. Co. v. *Union P. Ry.* 1 McCrary, 558; 3 Fed. Rep., 423.

Western U. T. Co. v. *St. Jo.* & Ry. 1 McCrary, 565; 3 Fed. Rep., 430.

Singer Co. v. *Union Co.*, 1 Holmes, 253.

Federal cases 12904.

In the last named case, LOWELL *J.*, says: "It is now firmly established that the Court will often interfere by injunction when it cannot decree specific performance."

In *Chicago & A. Ry. Co.* v. *N. Y. &c. R. R.* 24, Fed. Rep. 516 it was held that Equity will restrain the violation of covenants by injunction, notwithstanding their nature is such that specific performance would not be decreed.

The Court by WALLACE, *J.* (p. 521) says: "In many cases where the act to be done by the delinquent party was a single act, to compel which a single decree of the Court would be sufficient, but a series of acts which would call for the frequent interposition of the Court during a protracted period of time by successsve decrees or orders, the inconvenience of the remedy of specific performance has been deemed so great that the Courts have refused to interfere, and have left the party aggrieved to his remedy at law. So, also, when the act to be performed depends upon the skill, experience and cultivated judgment of the person who has obligated himself for its performances, courts of equity will not undertake to coerce a literal and perfunctory performance which would be but a vain and idle act.

It is one thing, however to stop a party from doing that which he cannot rightfully do, and another to undertake to compel him to do an act involving the exercise of faculties and judgment which are peculiar and personal to himself; and the argument from inconvenience which may properly be invoked when the court is asked to decree a specific performance would

if it should be controlling when the courts are asked to restrain the doing of an unlawful act, apply to all cases in which the corrective power by injunction is exercised."

Citing: *Lumley* v. *Wagner*, 1 De G. M., & G., 604.

McCaull v. *Braham*, 16 Fed. Rep. 38.

Singer S. M. Co. v. *Union*, 1 Holmes, 253.

Federal Cases, 12904.

Standard Fashion Co. v. *Siegel-Cooper Co.*, 52 N. Y. Sup., 433; 30 N. Y. App. Div., 564.

Even though a court of equity is unable to grant specific performance of an agreement involving the sale of plaintiff's goods in the defendant's store, because the business involved would be of a continuous nature and thus brought under the management of the Court, it may, nevertheless, grant an injunction restraining the defendant from violating a negative covenant not to sell or allow the sale of rival goods on its premises during a specific period.

See also *Central Trust* v. *Wabash*, 29 Fed. Rep., 546, at p. 558.

Prospect Park R. R. Co. v. *Coney Island R. R.*, 39 N. E. Rep., 17; 144 N. Y., 152, citing *Joy* v. *St. Louis*, 138 U. S., 1.

Wolverhampton R. R. v. *L. & N. W. R. R.*, L. R. 16 Eq., 433.

In this last case Lord Shelbourne says (p. 440): "With regard to the case of Lumley v. Wagner, to which reference was made, really, when it comes to be examined, it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance, the technical distinction being made that if you find the word 'not' in an agreement—

'I will not do a thing'—as well as the words 'I will,' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think it was safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise, whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative."

Joy v. *City of St. Louis*, 138 U. S. Rep., 1.

Where a decree of a Court of Equity is complete in itself and disposes of the controversy, it is no objection to it that the Court will have to take supplemental proceedings to carry it out and make it effective under altered circumstances.

"Acts in violation of a contract, or a term therein, will be restrained, and that although there be no evidence of any actual damage done, and it is no answer to say that the acts purposed will not be injurious, or even to prove that they will be beneficial to the plaintiff."

Joyce on Injunctions, p. 136. Citing :

Rankin v. *Huskisson*. 4 Sim., 13.

Dickinson v. *G. J. Canal Co.*, 15 Beav., 260.

See also High on Injunctions, Sec. 1135.

Rousillon v. *Rousillon*, L. R. 14 Ch. Div., 351.

Morse Co. v. *Morse.*, 103 Mass., 73.

McKinnon v. *Fountain*, 48 N. Y. Sup. Ct., 442.

The insertion of a provision for a penalty in a contract is no reason why specific performance should not be decreed.

Robinson v. *Cathcart*, 2 C. (C. C), 590.
20 Fed. Cas., p. 985.

"A clause in a contract stating that 'in further consideration of the said agreement the parties bind themselves each to the other in the penal sum of $1,000' is not to be considered as liquidating the damages for the breach of the agreement, but as a penalty superadded."

Daily v. *Litchfield*, 10 Mich., 29.

"Where, by the terms of a contract, a sum is mentioned as 'liquidated damages' for the nonperformance of several distinct stipulations of very different degrees of importance, and this sum is to be payable equally on a failure to perform the most important, or the whole of them together, it is, in legal effect, a penalty, and not stipulated damages; and the fixing of such a penalty by the contract is *no* objection to specific performance."

Fox v. *Scard*, 33 Beav., 327.

"A surgeon at W., upon taking an assistant, required him to give his bond in a penalty not to practice at W. Aftewards he discharged the assistant, who thereupon commenced practice at W. The surgeon filed a bill to restrain him, to which defendant demurred. The Court overrules the demurrer, holding that notwithstanding the pecuniary penalty the plaintiff was entitled to a remedy in equity."

Diamond Match Co. v. *Roeber*, 106 N. Y. Rep. 473.

"Defendant who was engaged in the manufacture in the State of New York and sale throughout the States and Territories, of friction matches, sold his manufactory, stock, fixtures, trade, trade

mark and good will of the business to a corporation then engaged in the same manufacture in the States of Connecticut, Delaware and Illinois, selling its manufactures throughout the country. The bill of sale contained a covenant on the part of defendant with the purchases "and assigns" that he would not, at any time within ninety-nine years, engage in such manufacture or sale, except in the service of the purchasing company, within any of the States or Territories, except Nevada and Montana. Defendant also at the same time executed to the purchasers a bond in the penalty of $15,000, conditioned to pay that sum as liquidated damages in case of a breach of his contract. In an action to restrain a breach of the covenant, held that the restraint was partial and not general, and that the covenant was valid, and a breach of it would be restrained; also that the equitable jurisdiction of the Court to enforce said covenant was not excluded by the fact that defendant in connection with it executed the bond."

Wilkinson v. *Colley*, 164 Pa. St., 35; 26 L. R. A., 114.

A clause binding one "in the penal sum of $400" for true performance of an agreement not to practice medicine within a certain place for ten years will be regarded as a penalty and not as liquidated damages, where there is nothing in the nature of the contract or the circumstances to show the contrary intent.

Naming a penalty for practicing medicine in a certain district in violation of an agreement not to practee there within ten years, *will not prevent an injunction against* such violation, where an action at law would be a wholly inadequate remedy.

The penalty of the loss of rebate was eliminated from the contract in the present case at the time the defendant adopted the contract of the antecedent partnership. This appears from the paper signed by the defendant at that time, a copy of which is annexed to the bill.

Has the complainant an adequate remedy at law.

The damages that the complainant will suffer from a continued breach of the contract by the defendant are set out in the bill. In regard to them the bill alleges:

> "10. And your orator further shows that there are now in the cities of Lincoln, St. Joseph, Omaha and Kansas City, and in various other cities in said States of Nebraska and Missouri, dealers in merchandise who have stores, and who for a long time past have and are now selling to the public, from time to time, phonographs, records and blanks purchased from your orator, which said phonographs, records and blanks have been purchased by the said dealers under contracts similar in all respects in terms and conditions to the said contract entered into by the said H. Wittmann & Co., and ratified and assumed by the defendant, which said dealers have always offered the said phonographs, records and blanks to the public at the said prices established by your orator, and that if the said defendant continue to sell and offer to sell said phonographs, records, and blanks at prices less than those established by your orator, as set out in the said agreement, it will seriously injure the business of the said dealers and cause them to purchase a less number of phonographs, records and blanks sold by your orator, and will seriously injure and damage your orator's said business and be of irremediable injury and damage to your orator."

Mr. Gilmore states in his affidavit:

> "It is a peculiarity of the public that if an article, notwithstanding its merits, is once advertised or sold at a cheap rate, afterwards the public are very adverse to paying a high price for it. The advertisement and sale by The Wittmann Company of Edison phonographs and records at

> less than the regular prices will be a great injury to the business of the National Phonograph Company. After once seeing an article quoted at a low price the public thereafter undervalues its merits and also are unwilling to pay the price they formerly were willing to pay for it. Also other dealers who maintain prices according to their contracts are accused by their customers of not treating them fairly and lose business both in regard to those articles and others, and it is a continual temptation to them to break their contracts if another dealer breaks his with immunity."

This case comes within a class of cases in which the courts have always held that the remedy of an action for damages at law was entirely inadequate. Among that class of cases are infringements of patents and trade marks, unfair competition in business, and the cases where an individual has sold out his buisness, agreeing not to carry on that business within a certain territory for a certain time, and has violated that contract.

Numerous cases of this last class may be cited, including *Diamond Match Co.* v. *Roeber*, 106 N. Y. Rep., 473; *Nordenfelt* v. *Maxim*, L. R. App. Cas. (1894) p. 535; *Wilkinson* v. *Colley*, 164 Penn. State, 35, 26 L. R. A., 114.

See also

> *American Box Co.* v. *Crossman*, 57 F. Rep., 1021. Affirmed, 61 F. Rep., 888.
>
> "A court of equity has jurisdiction of a bill to enforce a written contract whereby defendants have covenanted not to manufacture and sell any machines infringing certain patents claimed by complainants, and under which they are making and selling machines, since the continuance of such violation would tend to diminish complainant's profits in the business for which mere dam-

ages recoverable at law would not be an adequate remedy."

It is very evident in this case that, if the matter were tried before a jury, it would be impossible for the complainant, no matter how much its business had been injured, to present to the jury any evidence from which they could measure the damages, and that the verdict would necessarily be for merely nominal damages. The actions of the defendants at first might not in any way affect the complainant's business, but if not restrained it would induce other dealers also to cut prices. This again might not show any immediate injury to the complainant's business as the demand for its goods would not immediately fall off. As the goods became cheapened, however, they would become less desirable in the eyes of the public and considered inferior to other reliable articles of the same character, and so the public demand would fall off and the complainant's business be decreased.

But if the defendant attempted to introduce any evidence of this lessening of the public demand, it could not show by any competent evidence the cause of the falling off. The defendants might allege it was on account of the inferior quality of the complainant's goods. It would be impossible to call any adequate number of the public as witnesses, and the statements that any of the public made when refusing to purchase complainant's goods and purchasing others in their stead, would not be competent evidence. It is very evident, therefore, that the complainant is helpless in the matter unless protected by the injunction of a court of equity.

The importance of the maintenance of this plan of business to the complainant cannot be overestimated. It is a peculiarity of the public that if goods of a good quality are held at a good price there is much greater demand for them than if the price is reduced, and whenever the price of an article has been once reduced the public afterwards will never pay the higher price for it,

preferring rather to go without. The action of a single store in a city in cutting prices will have the effect of demoralizing the business in that city for a long time.

The alleged breach by the complainant of a separate agreement, to give the defendants a monopoly in Kansas City, is no defence to this action.

It is true that he who comes into equity must come with clean hands, and that one who breaks his part of an agreement cannot be heard in equity to complain that the other party has broken his part. But to have that effect the wrongful act of the complainant must have direct relation to the agreement sued on. The breach by the complainant of a separate agreement will not excuse the defendant for violating this one. The complainant complains of acts in no way connected with the issue in this cause.

Dering v. *Winchelsea*, 1 Cox, 318.

"A man must come into a court of equity with clean hands; but when this then is said it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for,"

Bonsack Mach. Co. v. *Smith*, 70 Fed. Rep., 383, 386.

"It is enough if the suitor shows that he has acted justly, fairly and legally in the subject matter of the suit. * * * The iniquity must have been done to the defendant himself, and must have been done in regard to the matter in litigation." Citing

1 Pom. Eq. Jur., 434.

Ansley v. *Wilson*, 50 Ga., 418.

The defendants' conduct is most inequitable. It refuses to pay a just debt which, by its answer in the Missouri suit, it admits to be due, and seeks to delay payment by setting up as a set-off the alleged violation by the complainant of an entirely separate agreement; and now it tries to use that alleged violation of the supposed agreement as an excuse for openly and boastfully vio-

lating its own contract. The wording of the advertisements inserted by the defendant in the daily press shows either a malicious animus towards the complainant and those connected with it, or is an attempt to prevent by intimidation the complainant from collecting its just debt and protecting its business from this gross violation of contract by the defendant.

Where contractural relations exist between parties, a court of equity will, as a rule, prevent, by preliminary injunction, a violation of the contract by either party, and maintain the status quo pending the final determination of the suit.

Ind. Gas Co. v. *City of Indianapolis*, 82 Fed. Rep. 245.

"Whether a temporary restraining order ought to be granted pending such judicial inquiry will depend largely on the character and extent of the inconvenience or injury to the one party or the other from the granting or refusing of it. It is settled that upon a preliminary application for a temporary restraining order all that the Judge should, as a general rule, require, is a case of probable right, and a probable danger to that right without the interference of the court, and its discretion should then be regulated by the balance of inconvenience or injury to the one party or the other."

Allison v. *Corsan*, 88 Fed. Rep. 581, 584.

"The controlling reason for the existence of the right to issue a temporary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during a litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. * * * A preliminary injunction, maintaining the status quo, may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while

the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

Charles v. *City of Marion*, 98 Fed. Rep., 166, 168.

"In order to justify the granting of a temporary restraining order it is sufficient if the plaintiff shows the existence of a prima facie right, with a threatened injury to that right by the defendants, and that the granting of a temporary restraining order would be less injurious to the defendants than the refusal to grant it would be to the plaintiff."

Great W. R. Co. v. *Birmingham*, 2 Phil., 602.

"It is certain that the Court will in many cases interfere and preserve property in statu quo during the pendency of the suit in which the rights are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights."

In view of the fact that a contract exists between the plaintiff and the defendant, which the defendant is deliberately violating; that the validity of the contract is established by a long line of weighty decisions; that such violation is a great and serious injury to the plaintiff's business and compelling the defendant to live up to its contract will be no hardship on the defendant; we respectfully submit that an injunction should issue restraining the defendant from violating or threatening to violate its contract until the final decree in this suit.

MONTGOMERY & HALL,
Solicitors of Complainant.

HOWARD W. HAYES,
Of Counsel.